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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

R. E. PAYNE,

Petitioner

versus

UNITED STATES DEPARTMENT OF JUSTICE
AND FEDERAL BUREAU OF INVESTIGATION

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

INTRODUCTORY STATEMENT

The Fifth Circuit Court of Appeals affirmed the manifestly erroneous judgment of the United States District Court for the Eastern District of Louisiana granting the motion for summary judgment filed by the United States Department of Justice and the Federal Bureau of Investigation and denying the FOIA request of R. E. Payne, petitioner herein. Payne is seeking disclosure of information obtained by electronic surveillance, conducted pursuant to the provisions of the Omnibus Crime Control and Safe Streets Act, in the office of Carlos Marcello that reveals Mafia connections of John Volz, the then United States attorney for the Eastern District of Louisiana.

QUESTIONS

1. Whether the opinion of the Fifth Circuit is incorrect and in conflict with the legal reasoning of courts in other circuits in its interpretation of the meaning of the right of access to information generated by electronic surveillance pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act.

2. Whether the opinion of the Fifth Circuit is in conflict with

and defeats the legislative intent to establish openness in government by passage of the Freedom of Information Act by insulating government agencies from public scrutiny when information is generated by electronic surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act.

3. Whether material facts are in dispute in this case and the motion for summary judgment should not have been granted.

4. Whether there was bias and prejudice on the part of the judiciary of the Fifth Circuit because of the role of Judge Charles Schwartz in his failure to disclose his knowledge of the sealing and storage of the tapes in his office safe and his failure to recuse himself in this case in the district court if he were biased and prejudiced.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel hereby certifies that the following persons have an interest in the outcome of this case.

1. MICHAEL SOILEAU, SR., attorney for plaintiff-petitioner, Covington, La.

2. J. CHARLES COLLINS, JR., attorney for plaintiff-petitioner, New Orleans, La.

3. ENID A. FRANCIS, Assistant United States Attorney for the Eastern District of Louisiana, New Orleans, La.

4. JOAN ELAINE CHAUVIN, Assistant United States Attorney for the Eastern District of Louisiana, New Orleans, La.

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The plaintiff-Petitioner, R. E. Payne, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 11, 1997.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals sought to be reviewed was entered on July 11, 1997, and it is not reported and will not be reported by order of that court in its opinion which appears at Appendix A. The opinion of the District Court for the Eastern District of Louisiana was signed on July 22, 1996, and it has not been reported. The opinion appears as Appendix B hereto.

JURISDICTION

The jurisdiction of the United States District Court is pursuant to 5 U.S.C. Section 552 (b)(3); 5 U.S.C. Section 552 (b)(7)(C); 18 U.S.C. Sections 2510-2520; 28 U.S.C. Section 1331; Federal Rule of Civil Procedure 56 (a). The Jurisdiction of the Fifth Circuit Court of Appeals is under 28 U.S.C. Section 1291. Jurisdiction of the United States Supreme Court is pursuant to 28 U.S.C. Section 1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 14 (f) the verbatim quotations of the following Statutes and Rules are set forth in Appendix C hereto.

5 U.S.C. Section 552 (b)(3)
5 U.S.C. Section 552 (b)(7)(C)
18 U.S.C. Section 2517
Fed. R. Civ. P. 56 (a)

STATEMENT OF THE CASE

Plaintiff-petitioner, R. E. Payne, filed suit on September 8, 1995, asserting a right of injunctive and declaratory relief under the Freedom of Information Act, (F.O.I.A.), 5 U.S.C. Section 552. R 281 Interrogatories and a request for a *Vaughn v. Rosen* index were filed with the Complaint seeking information relative to the search for tapes and recaps of such tapes of conversations recorded on February 1, 2, and 3, 1980, in the office of Carlos Marcello at 1201 Airline Highway, Metairie, Louisiana, by the FBI in conjunction with its BRILAB investigation. R 274 and Appendix G herein. The conversations were among participants Carlos Marcello, Vincent J. Bruno, John W. Condon, Jr., and Sam Cariola involving discussions of their closeness to John Volz, the then United States Attorney for the Eastern District of Louisiana. R 281

The defendants-respondents denied the requests for the tapes and transcripts and their answers to the interrogatories merely alleged prematurity of the request for information and they stated that the information sought was beyond the discovery allowed by the Freedom of Information Act. The defendants-respondents also alleged that the tapes and recaps could not be found. R 366 The defendants-respondents filed a Motion For Protective Order again alleging prematurity, inability to locate such tapes and recaps, and that the discovery sought was beyond the scope of the Freedom of Information Act. The plaintiff-petitioner filed an Opposition to the Motion for Protective Order and a hearing was held before the magistrate. R 237-238

The defendants-respondents filed a Motion For Summary Judgment on May 30, 1996, in which they erroneously alleged that no material facts are in dispute and that as a matter of law they are entitled to an order granting their motion. They alleged in their motion and affidavits in support thereof that the New Orleans office of the FBI conducted a search after this suit was filed and they found six tapes, three logs and two transcripts that are responsive to plaintiff-petitioner's request which were forwarded to the FBI Headquarters in Washington, D.C. They further alleged that after reviewing the records and tapes, it was determined that they should be withheld under Exemptions 3 and 7 (C) of the FOIA, 5 U.S.C. Sections 552 (b)(3) and (b)(7)(C) and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-2520. R 141-185.

Plaintiff-petitioner filed an opposition to the defendants-respondents' Motion For Summary Judgment alleging that the motion should be denied because material facts are in dispute. The facts in dispute are: (1) whether the search conducted by the FBI was in good faith or whether the FBI was attempting to protect corrupt activities of an unethical United States attorney, John Volz; (2) whether there was misconduct on the part of the FBI in this cover-up activity; (3) whether the public interest in learning the facts about improper activities of the FBI and the Justice Department outweighs any privacy interest claimed by the defendants-respondents; (4) what, if any, privacy interests exists; (5) why were the six tapes not used in the BRILAB prosecution and was the reason that they contain a conversation of Carlos Marcello, Sam Cariola, John Condon and Vincent Bruno revealing corrupt activities of John Volz and his involvement with organized crime; and (6) whether the defendants-respondents should be compelled to comply with the interrogatories propounded to them by the plaintiff-petitioner and whether they should be required to produce the *Vaughn v. Rosen* index requested by the plaintiff-petitioner. The list of six tapes do not include the tapes made on February 1, 1980, and a material fact exists as to

whether a reasonable search was made to locate that tape. See the affidavit of R. E. Payne at Appendix E hereto.

On July 19, 1996, the district court entered an order granting the defendants-respondents' Motion For Summary Judgment stating as the reason therefor that it was admitted the tapes in question were obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-2521. The Act was found by the court to closely regulate the government's authority to disclose intercepted communications. The court concluded that Title III was within the scope of Exemption 3 of the Freedom of Information Act, and, therefore, the government was not required to turn over the tapes requested by the plaintiff-petitioner under the FOIA. R 7-8, Appendix B hereto. The judgment was signed on July 22, 1996. R 6 From that judgment, the plaintiff-petitioner prosecuted his appeal. R 9 No transcript was ordered because none was required, but the appeal was dismissed because no transcript was ordered. The court granted plaintiff-petitioner's motion to reinstate the appeal. R 1 and 2. Plaintiff-petitioner was permitted to remove the record for use in preparing the brief in the court of appeals but was denied the right to remove this record to prepare this petition for writ of certorari.

On July 11, 1997, the Fifth Circuit Court of Appeals affirmed the judgment of the district court. In its opinion, the appellate court erroneously states that the FOIA request of Payne was in response to a defamation suit filed by John Volz. The defamation suit was filed in the Civil District Court for the Parish of Orleans, State of Louisiana, on June 26, 1996. See Appendix D hereto. The request by Payne was first made to the FBI by letter dated June 2, 1994, and his complaint was filed herein on September 8, 1995, which was long before the defamation suit was filed. The Fifth Circuit apparently concluded erroneously that the purpose of Payne's request under the FOIA was to provide a defense to the defamation suit.

Payne is a journalist and author presently engaged with the "Watchdog" Newspaper. He worked with the FBI at the request of the FBI. He was wrongfully prosecuted by the Department of Justice while John Volz was the United States attorney for the Eastern District of Louisiana. He was acquitted by the jury, and he wrote the details of his ordeal in his book "Caught in the Crossfire; The R. E. "Gus" Payne Story". He also authored "Above the Law: The Unauthorized Biography of John Volz". His investigation of Volz led him to much information about the unethical practices of John Volz. Payne has reason to believe that the information he seeks in his FOIA request will disclose discussions by Carlos Marcello, Sam Cariola, John W. Condon and Vincent Bruno of Volz's acceptance of bribes from persons seeking to influence handling of cases and/or investigations and/or sentences. Unethical conduct on the part of the FBI, the Justice Department and even Judge Charles Schwartz may be disclosed if these parties had such information about John Volz and failed to disclose it and investigate it further. This is exactly the kind of openness in government the legislature provided in its passage of the Freedom of Information Act.

Carlos Marcello and Sam Cariola are deceased, and Vincent Bruno has waived any privilege he may have. Any statements regarding John Condon can be deleted. It is the Justice Department and the FBI that are claiming the privilege and privacy rights. Denial of the information sought will deny openness in government and will enable the coverup of unethical practices. To set such a precedent in this case will serve to immunize the government from accountability when information sought was obtained by electronic surveillance under the Omnibus Crime Control and Safe Streets Act and defeat the purpose of the FOIA. See Affidavit of R. E. Payne at Appendix E hereto and of Vincent Bruno at Appendix F hereto.

In response to Payne's letter of February 2, 1994, he was notified by the FBI by a letter dated June 2, 1994, that a reasonable

search failed to reveal information he had requested. Payne appealed that decision by letter dated June 12, 1994. Payne later learned that the tapes do exist and that they were sealed and placed in the safe of Judge Charles Schwartz by Judge Schwartz and FBI agent L. Eads Hogue, who was Chief of the Organized Crime Strike Force. By a letter dated August 11, 1995, from Richard Huff, Co-Director of the United States Department of Justice, Office of Information and Privacy, Payne was advised that the original notice stating no records could be located was correct. Huff further stated that if they could be located, they would be exempt under 5 U.S.C. Section 552 (b)(7)(C) and that "lacking an individual's consent, proof of death, or an overriding public interest, disclosure of law enforcement records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy". Appendix G hereto.

When this suit was filed in the United States District Court for the Eastern District of Louisiana on September 8, 1995, a motion for a *Vaughn v. Rosen* index and interrogatories were filed with the Complaint for Declaratory and Injunctive Relief. The district court denied the discovery motions but reserved Payne's right to reurge them once the defendants-respondents had sufficient time to review their files, answer the complaint, and prepare any dispositive motions. Appendix G

Not until the Justice Department and the FBI filed their motion for summary Judgment on May 30, 1996, did they admit the existence of the requested information, except one tape made on February 1, 1980. However, they allege that the information requested and now located is exempt under 5 U.S.C. Section 552 (b)(3) and 5 U.S.C. Section (b)(7) because the tapes were obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-2521. Appendix C

The Fifth Circuit observed that the request for the *Vaughn v. Rosen* index was not reurged and the request for answers to inter-

rogatories was not pursued by plaintiff-petitioner. Until the Motion For Summary Judgment was filed, the defendants-respondents had denied existence of any such tapes. If the tapes were not in existence, information requested as to the contents of the tapes could not have been provided and to reurge the discovery requests would have been futile. Failure to reurge the discovery motions after the admission of the existence of the tapes with filing of the motion for summary judgment does not erase the existence of material facts in dispute and justify granting the motion for a summary judgment. In the opposition to the motion for summary judgment, the plaintiff-petitioner expressed his intent to pursue such motions once the motion for summary judgment was denied.

The Fifth Circuit Court of Appeals stated in its opinion that "Pursuant to 5th Cir. R 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4". This appears to be an attempt on the part of the court to cover up the facts that disclose unethical practices of John Volz and unethical practices of the Justice Department, the FBI and Judge Charles Schwartz who knew of such practices but failed to investigate and disclose such facts about John Volz. Judge Schwartz was the judge in the BRILAB prosecution of Carlos Marcello and he was the district court judge in this case. He was aware of the contents of the tapes and he and L. Eads Hogue sealed the tapes and stored them in his safe. He failed to disclose this and he did not recuse himself from this case. These facts and circumstances point to bias and prejudice on the part of the district court judge and the judges of the Fifth Circuit Court of Appeals apparently are endeavoring to cover up by ordering the opinion to not be published or be a precedent case.

REASONS THE WRIT OF CERTIORARI SHOULD BE GRANTED

The decision of the Fifth Circuit Court of Appeals holding that information obtained by surveillance conducted under the provisions of the Omnibus Crime Control and Safe Streets Act is not discoverable under the provisions of the Freedom of Information Act insulates the Government from openness in Government.

The disclosure provisions of the Freedom of Information Act have been interpreted broadly to reflect a Congressional policy favoring free and open disclosure of a wealth of material to the public. Congress enacted the FOIA to further a goal deemed vital to the proper operation of a democracy – an informed electorate. The only avenue available to an agency wishing to deny access to information is to demonstrate that the information falls within one of the enumerated exemptions. See *Toran, Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules,* 49 Geo. Wash. L. Rev. 843 (1981).

The information sought here is exactly what Congress intended to be made available to assure openness in government. Plaintiff-petitioner was told by L.Eads Hogue that as Chief of the Organized Crime Strike Force in charge of the FBI operation known as BRILAB he either heard or read of every tape produced by the FBI in the office of Carlos Marcello at 1201 Airline Highway, Metairie, Louisiana. Hogue told him that approximately 1600 tapes were created in the office of Marcello during the period of BRILAB. Tapes were made at Marcello's office on February 1, 2, and 3, 1980, involving Carlos Marcello, Vincent Bruno, Sam Cariola and John Condon, Jr., discussing John Volz's acceptance of bribes from persons seeking to influence the handling of cases and/or investigations and/or sentences. Vincent Bruno told Payne that the conversations were about John Volz's soliciting and being paid bribes for his assistance to certain members of the La Casa Nostra in the handling of cases under his juris-

diction, and Condon was on only one tape. Hogue told plaintiff-petitioner that all of the tapes were sealed by him and United States District Judge Charles Schwartz and placed in Judge Schwartz's safe, and unless the tapes were removed under orders from the FBI the tapes should still be in the safe, and if removed under orders, the FBI has custody of them. R 392 Appendix E.

Hogue told plaintiff-petitioner that official and authenticated documents prepared by the FBI recapping each conversation recorded on the telephone and in the office of Marcello were provided at the end of each shift to the supervisor of the FBI agents in charge of monitoring the conversations and recording notes of their contents. These summaries were also provided to the Chief, Organized Crime Strike force and an official summary of each conversation was made and given to him, Hogue. Hogue agreed that the summary of the conversations requested were made by the FBI and that these conversations, according to the FBI's summaries, were about John Volz. R. 392. Only the "Play List" of tapes utilized at the Carlos Marcello trial was provided by the FBI in response to Payne's request, and the defendants-respondents denied that they could find the tapes recorded on February 1, 2, and 3, 1980 until May 30, 1996, when they listed the February 2 and 3, 1980, tapes as found in their Motion For Summary Judgment. R. 392, R. 141-185.

The tapes listed in the defendants-respondents' Motion for Summary Judgment are as follows:

1. Log and tape of 12 minute telephone call on February 2, 1980 from Vincent Bruno to Carlos Marcello.

2. Log and tape of 10 minute telephone call on February 2, 1980 from Vincent Bruno to Sam.

3. Log and tape of five minute telephone call on February 2, 1980 from Carlos Marcello to Vincent Bruno.

4. Log and tape of seven minute telephone call on February 3, 1980 from Carlos Marcello to Vincent Bruno.

5. Log, tape and transcript of conversations on February 2, 1980 between Carlos Marcello to Vincent Bruno.

6. Log, tape and transcript of conversation on February 2, 1980 between Carlos Marcello to Vincent Bruno.

The defendants-respondents allege that all of the above listed documents were obtained during the course of the BRILAB investigation. They contend that these documents and tapes are being withheld pursuant to Exemptions 3 and 7 (C) of the FOIA, 5 U.S.C. Section 552 (b)(3), 7 (C). and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-20. R. 143-185.

A SUMMARY JUDGMENTS IN FOIA CASES

As in any civil case, parties in FOIA cases may move for summary judgment twenty days after service of the complaint has been accomplished. Fed.R.Civ.P. 56 (a). Judicial review of withholding under FOIA is *de novo,* rather than a more narrow standard of review such as an "arbitrary or capricious" or "substantial evidence" test. 5 U.S.C. Section 552 (a)(4)(B). This means that the district court must develop its own record to determine whether documents are properly being withheld, instead of merely relying on the administrative record. Thus, there is more of a role for discovery in FOIA cases than in other actions reviewing agency decisions. See *Washington Post Co. v. Department of State,* 840 F.2d 26, 29-35 (D.C. Cir. 1988), vacated, 898 F.2d 793 (D.C. Cir. 1990) in which the court ruled that summary judgment is inappropriate "when the litigants quarrel over key factual premises for a determination" regarding "the probable consequences of releasing particular information".

In *Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309 (D.C. Cir. 1988) the court stated that if material facts are genuinely in issue or, though undisputed, are susceptible to divergent inferences bearing upon an issue critical to disposition of the case, summary judgment is not available. But if, on the other hand, neither of these two scenarios is present, a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists.

In this case, material facts as discussed above are in dispute and the case should be remanded to the district court for further proceedings.

B DISCOVERY IN FOIA CASES

The plaintiffs in FOIA cases suffer the inherent handicap of not knowing the contents of the documents at issue. Discovery is necessary to provide plaintiffs with the information they need to advance the pro-disclosure position and establish a record sufficient to permit the courts to resolve FOIA disputes.

In order to permit adversarial testing of the government's claims of exemption without compromising the confidential nature of the requested records, the United States Court of Appeals for the D.C. Circuit established specific discovery procedures to be employed in an FOIA case. *Vaughn v. Rosen (1)*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The *Vaughn* procedures, which have been adopted by virtually all of the circuits, require the government to provide the FOIA plaintiff and the court an itemized "index" of the withheld records that describes each document or withheld portion and gives a detailed justification of the agency's grounds for withholding, correlating each exemption claimed with the record or portion to which it assertedly applies.

In *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949

(D.C. Cir. 1979), the court held that there are three indispensable elements of a *Vaughn* index:

(1) The index be contained in one document, complete in itself.

(2) The index must adequately describe each withheld document or deletion from a released document.

(3) The index must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant.

The court further stated that the explanation of the exemption claim and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under the FOIA. The court recognized that these requirements place an administrative burden on the agencies, but concluded that less exacting standards would not satisfy the FOIA's unambiguous policy in favor of the fullest possible disclosure of government records.

The normal federal discovery rules also apply to FOIA cases. Rule 1 of the Federal Rules of Civil Procedure provides that "The rules govern the procedure in the United States district courts in all suits of a civil nature". While a *Vaughn* motion should force the government to provide a description of the documents at issue, additional discovery by way of interrogatories, depositions, requests for admissions, etc., may be used to expand the government's generalized or ambiguous description of the records, or to test the basis for the government's claim that the documents are exempt from disclosure. See *Renegotiation Board v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168, 181 (1975). In *Schaffer v. Kissinger,* 505 F.2d 389,391 (D.C. Cir. 1974) the district court's grant of summary judgment was reversed and remanded with instructions that plaintiff-appellant be permitted to undertake dis-

covery relating to whether the records in question had been "properly classified".

Discovery as to the adequacy of the agency's search is crucial to the FOIA plaintiff and to proper judicial administration of the FOIA. To accept the government's claim of inability to retrieve the requested documents in the circumstances presented raised the spector of easy circumvention of the Freedom of Information Act. If, in the face of well-defined requests and positive indications of overlooked materials, an agency could so easily avoid adversary scrutiny of its search techniques, the Act would inevitably become nugatory. See *Founding Church of Scientology of Washington v. NSA*, 610 F.2d 824, 836-37 (D.C. Cir. 1979); *Weisberg v. Department of Justice*, 543 F.2d 308, 311 (D.C. Cir. 1976).

The established standard for the adequacy of an agency's search efforts is "reasonableness", and the district court must "expressly conclude that the search was adequate or that it satisfied the reasonableness standard". See *Krikorian v. Department of State*, 984 F.2d 461 (D.C. Cir. 1993); *Truitt v. Department of State*, 897 F.2d 540 (D.C. Cir. 1990); *Founding Church of Scientology of Washington v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). Where challenged, the facts concerning the adequacy of the search will be viewed in the light most favorable to the requester. See *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1983).

Normally an agency is permitted to establish the adequacy of its search through affidavits. In the absence of countervailing evidence or apparent inconsistency of proof, affidavits explaining in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA. See *Perry v. Block*, 684 F.2d 121 (D.C. Cir. 1982) and *Safecard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991). However, where the agency's description of its search is conclusory, or the record raises serious doubts as to the completeness of the agency's search, or there is evidence of

agency bad faith, summary judgment for the government based on affidavits alone is inappropriate. In such cases, the plaintiff is entitled to discovery to ascertain the nature and scope of the search undertaken by the agency. See *Exxon Corp. v. FTC (1),* 466 F. Supp. 1088, 1094 (D.D.C. 1978), aff'd, 663 F.2d 120 (D.C. Cir. 1980); *Neugent v. Department of Interior,* 640 F.2d 386 (D.C. Cir. 1981); *Weisberg v. Department of Justice,* 543 F.2d 308 (D.C. Cir. 1976); *Founding Church of Scientology of Washington v. NSA,* 610 F.2d 824 (D.C. Cir. 1979). Such circumstances do exist herein.

In the case here before the court, the adequacy of the defendants-respondents' search for the documents and tapes requested is a material fact in dispute.Another material fact in dispute is the bad faith of the defendants-respondents in covering up illegal activity and corruption on the part of John Volz by failure to disclose the existence of the tapes and documents until May 30, 1996, with the filing of the Motion For Summary Judgment. There is no explanation for the absence of the February 1, 1980 tape that was requested. Information requested pertaining to the adequacy of the search would shed light on these facts in dispute. The entire record and, in particular, the affidavits filed by the defendants-respondents in support of their Motion For Summary Judgment and their allegations in their motion (R. 143-184) and the affidavits of plaintiff-petitioner and Vincent Bruno attached in support of the plaintiff-petitioner's opposition to the defendants-respondents' Motion For Summary Judgment establish material facts in dispute as to the adequacy of the search and the bad faith and improper conduct of the FBI and the Justice Department and perhaps Judge Schwartz. R. 84-105 Appendix E and F.

C INFORMATION EXEMPTED BY OTHER STATUES

Exemption 3 provides that the FOIA does not apply to matters that are: "specifically exempted from disclosure by statute, (other than Section 552 (b) of this title) provided that such statute (A)

requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

The government bears the burden of proving that requested documents are properly withheld. The obligation to prepare a *Vaughn* index applies fully to Exemption 3 cases, and the agency must show specifically and clearly that the requested materials fall into the category of documents that Congress exempted from disclosure.

The defendants-respondents have determined that the documents and tapes requested by plaintiff-petitioner should be withheld under Exemption 3 of the FOIA, 5 U.S.C. Section 552 (b)(3) and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.Sections 2510-20 as they were acquired by electronic surveillance under that Act.

In interpreting the right of private individuals and the news media to documents and tapes which were acquired by electronic surveillance, the courts have balanced the Fourth Amendment right to privacy with the First Amendment right to access. The legislative and judicial history of 18 U.S.C. Section 2517 (C) is reviewed in the law review note entitled "The End of the Line? In Re Motion to Unseal Electronic Surveillance Evidence: Limiting Private Civil Rico Litigants' Access to Government Wiretaps", Note, 38 St. Louis U.L.J. 769 (1994). R. 105-133.

In the case of *In re Motion to Unseal Electronic Surveillance Evidence*, 990 F.2d 1015 (8th Cir. 1992), the conflict of judicial opinion on the meaning of 18 U.S.C. Section 2517 (3) is evident. The district court denied the requested surveillance evidence, the panel of the appellate court reversed and remanded the district courts decision and the en banc court, with five judges dissenting, reversed the decision of the panel and denied access. In that case,

a civil RICO litigant requested surveillance evidence which was denied him by the en banc court. The slight majority opinion states that although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern. The court concluded that Congress provided for very limited disclosure of any wiretap evidence that is obtained, and it specifically required that recordings made under Title III be sealed by the authorizing judge and provided for disclosure and use of the intercepted conversations under very specific circumstances. The court in the majority opinion further reasoned that when addressing disclosure of the contents of a wiretap, the question is whether Title III specifically authorizes such disclosure, not whether Title III specifically prohibits the disclosure, for Title III prohibits all disclosures not authorized therein.

The five judges dissenting opinion states that the court based its opinion not on the language of the law or on commonly accepted principles of statutory construction, but on the court's own notion of acceptable public policy, and it implements policy decisions not within the powers delegated to the court. The dissenting opinion examined the general rules of law dealing with evidentiary exclusions. It cited approvingly *Trammel v. United States,* 445 U.S. 40 (1980) in which the court observed that exclusionary rules and privileges contravene the fundamental principle that the public has a right to every mans evidence. As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. See also *Elins v. United States,* 364 U.S. 206 (1960).

In *United States v. Nixon,* 418 U.S. (683) (1974), the court looked to limitations on evidence gathering and concluded that whatever the origins (constitutional, statutory, or common law), these exceptions to the demand for every mans evidence are not

lightly created nor expansively construed for they are in derogation of the search for truth.

In *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990) the court stated that it was especially reluctant to recognize an evidentiary privilege in an area where it appeared Congress has considered the relevant conflicting concerns but has not provided the privilege itself. The balancing of conflicting interests of this type is particularly a legislative function.

In *In re National Broadcasting Co. v. United States Department of Justice,* 735 F.2d 51,54 (2d Cir. 1984) the court reasoned that because Congress was concerned with protecting conversational privacy when it enacted Title III, it does not inexorably follow that lawfully intercepted communications may never be released to private litigants although 18 U.S.C. Section 2517 should not be used as a general discovery mechanism. The court must carefully balance the competing interests implicated. In particular, the court must balance the need for discovery with the confidentiality and privacy interests of the party opposing disclosure and any government objections to disclosure.

In *Application of Newsday, Inc.,* 895 F.2d 74 (2d Cir. 1990), the court concluded that there was a qualified constitutional right to access to a warrant application, stemming from (1) a tradition of accessibility of such materials by the press and public, and (2) the significant role in the functioning of the search and seizure processes that such access would play. The court further noted that a statute should not be construed so as to conflict with a constitutional right. The court held that Title III of the Omnibus Crime Control and Safe Streets Act of1968 did not bar release of the intercepted communications recorded in the application for the search warrant that had been requested. The court noted that it was required to balance the qualified right to access against the privacy rights of parties to the taped conversations. Because of the legitimate public interest in the case and the fact that the

defendants-appellees' privacy interest had been diminished by their guilty pleas and the mundane business nature of the recorded conversations, the court ordered the application for the search warrant unsealed, redacting only those portions of the affidavit that gave the names of individuals or corporations that had not been indicted or otherwise disclosed. The government took the position in that case that Title III does not forbid disclosure. The court agreed that Title III generates no right to access, but it is a non-sequitur to conclude the adverse that Congress intended in Section 2517, which relates solely to use in law-enforcement activities and judicial proceedings, to forbid public access by any other means or any other occasion. The court noted that the interest necessary to support issuance of a writ compelling access to public and judicial documents and records is the citizen's desire to keep a watchful eye on the workings of public agencies and a newspaper publisher's intention to publish information concerning the operation of government. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The court in *Nixon* observed that the jurisprudentially established right of access has been an infrequent subject of litigation, whose contours have not been delineated with any precision. It stated that access is a decision best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

The test enunciated in the New York Times cases (*In re New York Times,* 828 F.2d 110 (*New York Times I*) (2nd Cir.), after remand 834 F.2d 1152 *(New York Times II)* (1987), after remand 837 F.2d 599 *(New York Times III),* cert. denied, 485 U.S. 977 (1988) is that the court should consider whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of tape. A district court has the right to redact a document or portion of a document that refers to an innocent third party.

In the Matter of Electronic Surveillance, 596 F.2d 991 (E.D. Mich. 1984) The Grievance Administrator of the Michigan Attorney Grievance Commission was provided information gleaned from electronic surveillance which incriminated members of the Michigan State Bar. It was released as the administrator was found to be an officer empowered to investigate offenses enumerated in 18 U.S.C. Section 2516.

The judgment of the district court affirmed by the Fifth Circuit Court of Appeals is manifestly erroneous in holding that because the tapes requested were obtained under the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-2521, they are exempt from discovery under Exemption 3 of the Freedom of Information Act citing *Lam Lek Chong v. DEA, 929 F.2d 729, 734-745 (D.C. Cir. 1991)* and *Davis v. Dept. of Justice, 968 F.2d 1276, 1280-1281 (D.C. Cir. 1992)* to support the holding. The court found that Title III clearly identifies intercepted communications as the subject of the disclosure limitations and that the policy underlying Subsection (B) of the Freedom of Information Act dictates that Title III be treated as an exempting statute. The court in *Manchester v. Drug Enforcement Administration,* 823 F.Supp. 1259 (E.D. Penn. 1993), followed the reasoning of the District of Columbia circuit. Concern of the courts was protection of personal privacy. To follow these cases will result in removing government agencies from public scrutiny when electronic surveillance is the object of an FOIA request. The district court and the Fifth Circuit did not discuss the conflicts in legal reasoning among the cases interpreting these statutes and the right of access to every mans evidence.

Exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence. As such they must be strictly construed and accepted only to the very limited extent that permitting refusal to testify or exclude relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the

truth. See *Elkins v. United States,* 364 U.S. 206 (1960) and *Trammel v. United States,* 895 F.2d 74 (2nd Cir. 1990).

As the court observed in *Application of Newsday, Inc.,* 895 F.2d 74 (2nd Cir. 1990), Title III generates no right of access, but it is a non-sequitur to conclude the adverse that Congress intended Section 2517, which relates solely to use in law-enforcement activities and judicial proceedings, to forbid public access by any other means or any other occasion. The interest necessary to support issuance of a writ compelling access to public and judicial documents and records is the citizens desire to keep a watchful eye on the workings of public agencies and a newspaper publisher's intention to publish information concerning the operation of government.

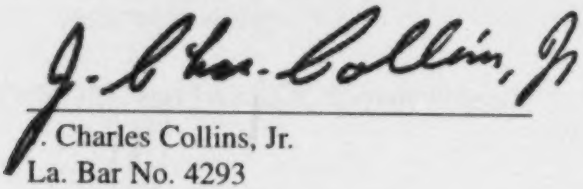
Plaintiff-petitioner, who is a journalist has such an interest. Because of this interest, he was sued by John Volz, for defamation in the case entitled *John Volz v. R. E. "Gus" Payne,* Twenty Fourth Judicial District Court for the Parish of Jefferson, No. 495-132. That suit was filed long after his FOIA request was made and suit was filed herein under the FOIA. It is believed that information requested herein will reveal John Volz's Mafia association. Appendix D and Appendix E. The tapes were in Judge Charles Schwartz's safe and he had knowledge of the recordings. He did not recuse himself. Perhaps his decision was influenced by his relationship to the BRILAB case and his interest in protecting John Volz, the FBI and the United States Department of Justice.

CONCLUSION

The tapes made on February 1, 2, and 3, 1980, which have been requested by plaintiff-petitioner herein are believed to contain conversations of Carlos Marcello, Sam Cariola, John Condon, Jr., and Vincent Bruno which disclose improper, unethical and corrupt behavior of John Volz, the United States attorney at that time, and failure of the FBI and the United States

Department of Justice to investigate and disclose to proper authorities such information in an effort to cover up wrongful activities. This is just the type of information which should be disclosed under the FOIA. The public interest in knowing of wrongful actions on the part of the government outweighs any privacy interest. Carlos Marcello and Sam Cariola are deceased. See *Keys v. United States Department of Justice,* 830 F.2d 337, 345 (D.C. Cir. 1987). Vincent Bruno has waived any privacy claim he may have. If there is any part of a tape containing references of conversations of John Condon, Jr., who is still alive, this can be redacted. John Volz would have no such claim in these circumstances. Any other third-persons who have a claim can have such portion redacted. Further discovery is needed to make these determinations. For the foregoing reasons, the judgment granting the defendants-respondents' motion for summary judgment should be denied and the case should be remanded. Defendants-respondents should be required to produce the *Vaughn v. Rosen* index, answer the interrogatories propounded to them, and produce the tapes requested for the reasons stated above.

Respectfully Submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30840
Summary Calendar

United States Court of Appeals
Filed July 11, 1997
Charles R. Fulbruge III, Clerk

R. E. PAYNE,

Plaintiff-Appellant,

versus

DEPARTMENT OF JUSTICE;
FEDERAL BUREAU OF INVESTIGATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(95-CV-29 68-A)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:*

Appellant R.E. Payne appeals the district court's order granting the Department of Justice's and the Federal Bureau of Investigation's (the "FBI") motion for summary judgment and rejecting his FOIA requests. For the following reasons, we affirm.

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

BACKGROUND

In response to a defamation suit filed by John Volz against appellant R.E. Payne for information contained in several publications indicating that Volz had accepted bribes in connection with his position as a United States Attorney for the Eastern District of Louisiana and that Volz had ties to the Mafia, Payne submitted a request to the FBI under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Payne sought tape recordings made during a criminal investigation of reputed Mafia boss Carlos Marcello during the FBI's BRILAB operation. Payne also sought any FBI reports summarizing or characterizing the tape recordings. The Government notified Payne that they did not have any recordings or documents which would fulfill his request.

On September 8, 1995, Payne filed suit against the appellees asserting a right to injunctive and declaratory relief under the FOIA. He sought the same information he previously requested, except he expanded his request to include one additional date. On that same day, Payne also filed a Motion for a *Vaughn*[1] index. The district court denied Payne's motion, but reserved his right to reurge the motion "[o]nce the defendants have had sufficient time to review their files, answer the complaint, and prepare any dispositive motions." Payne never reurged the motion.

Pursuant to his newly expanded request, the FBI conducted another search to determine whether records or tape recordings responsive to Payne's request were located in its New Orleans Division. The search revealed six tape recordings. It was subsequently determined that, although responsive to Payne's request, the tapes would be withheld under Exemptions 3 and 7(c) of the FOIA, 5 U.S.C. § 552 (b)(3), (b)(7).

1. *See Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The purpose of a *Vaughn* index is to evaluate the adequacy of an agency's response to a FOIA request. *See Voinche v. FBI*, 999 F.2d 962, 963 n.* (5th Cir. 1993).

On May 30, 1996, the Government filed a motion for summary judgment contending that it fully discharged its obligations to Payne because under the FOIA the search for the requested records was reasonable and the tape recordings were exempt. The district court granted the motion, holding that the tape recordings, having been obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521, fell within the scope of Exemption 3 of the FOIA. Payne timely appealed.

DISCUSSION

We review *de novo* the district court's decision regarding whether items are exempt under FOIA. *See Avondale Indus., Inc. v. NLRB,* 90 F.3d 955, 958 (5th Cir. 1996); *Voinche v. FBI,* 999 F.2d 962, 963 (5th cir. 1993). In a FOIA case, the agency has the burden of justifying nondisclosure. *See* 5 U.S.C. § 552(a)(4)(B). To prevail, an agency must first establish that it conducted an adequate search for responsive documents, "using methods which can be reasonably expected to produce the information requested." *See Oglesby v. U.S. Dep't of Army,* 920 F.2d 57, 68 (D.C. Cir. 1990). An agency may establish reasonableness through affidavits that provide a reasonably detailed and non-conclusional description of the agency's search methods. *See Patterson v. IRS,* 56 F.3d 832, 836 (7th Cir. 1995). If the agency demonstrates that it conducted a reasonable search, the FOIA requester can rebut the agency affidavits by producing tangible evidence of bad faith. *See Minier v. CIA,* 88 F.3d 796, 803 (9th Cir. 1996) (citing *Carter v. U.S. Dep't of Commerce,* 830 F.2d 388, 393 (D.C. Cir. 1987)).

Once it is established that the agency conducted a reasonable search, the agency must then prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Miller v. United States Dep't of State,* 779 F.2d 1378, 1382-83 (8th Cir. 1985) (quoting *Nat'l Cable Television Ass'n v.*

FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)) (internal quotation marks omitted). If the agency is asserting that a document is exempt from disclosure, it may sustain its burden through the submission of detailed affidavits or declarations that identify the documents and explain why they fall within the claimed exemptions. *See King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987).

Payne asserts that the FBI failed to perform a reasonable search and may have acted to conceal the tapes. He argues that the FBI should have found the tapes sooner and that the delay in locating the tapes shows the unreasonableness of the search. His argument is unavailing. The Government established the reasonableness of its search through the affidavits of Bobbie S. Olivari and Elizabeth M. Nemeth, the employees responsible for conducting the search. The affidavits set forth the manner in which the search was conducted, the files and databases searched, and the results of the search. Delay in locating a document is significant only to the extent that the evidence indicates that the delay resulted from a bad faith refusal to cooperate. *See Miller*, 779 F.2d at 1386; *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (adequacy of agency search upheld notwithstanding delay of over one and one-half years).

Payne also complains that certain tapes that he believes exist have not been listed. He avers that the failure of the FBI to list the tapes is further evidence of the inadequacy of the search and its bad faith, which cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents." *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981).

Payne's allegations of conspiracy and cover-ups, without tangible evidence to support his assertions, are insufficient to overcome the Government's submissions. The agency's submissions establish that there is no genuine issue of material fact as to the reasonableness of the FBI's search.

Further, the district court determined that the tape recordings, having been obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-21, fell within the scope of Exemption 3 of the FOIA. Payne asserts only that the district court erred in determining that Title III communications fell within Exemption 3. His argument is without merit.

Exemption 3 of the FOIA exempts from disclosure matters that are:

> . . . specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). Title II prohibits the disclosure of materials obtained through the use of electronic surveillance except in very specific, limited circumstances. *See* 18 U.S.C. § 2517. Contrary to Payne's assertions, Title III falls squarely within the scope of Exemption 3 of FOIA. *See Davis v. United States Dep't of Justice,* 968 F.2d 1276, 1280-81 (D.C. Cir. 1992); *Lam Lek Chong v. U.S. DEA,* 929 F.2d 729, 733-34 (D.C. Cir. 1991). The district court did not err in concluding that the subject tapes were exempt.

As to Payne's assertion that the district court erred in denying his request for a *Vaughn* index and responses to interrogatories, this court will intervene in discovery matters only upon a clear showing of manifest injustice – where the lower court's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party. *See Maynard v. CIA,* 986 F.2d 547, 567 (1st Cir. 1933). Payne's request for a *Vaughn* index was denied as premature, and the district court specifically reserved Payne's right to reurge his request. Payne chose not to do so. As to the

interrogatories, Payne's attorney represented to the court that the information responsive to the interrogatories was possibly under seal in the BRILAB prosecution. The court directed Payne to file a motion to unseal and to keep the court apprised of his efforts. Again, Payne chose not to do so. The district court did not abuse its discretion, and we perceive no error here.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

United States District Court
Eastern District of Louisiana
July 22, 10:34 a.m. 1996
Loretta G. Whyte, Clerk

R.E. PAYNE	CIVIL ACTION
VERSUS	NO. 95-2968
UNITED STATES DEPT. OF JUSTICE ET AL	SECTION "A"

JUDGMENT

Considering the written Order of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendants United States Department of Justice and the Federal Bureau of Investigation and against plaintiff R.E. Payne, dismissing with prejudice the plaintiff's complaint.

New Orleans, Louisiana, this 22nd day of July, 1996.

"S/Loretta G. Whyte"
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

"S/Charles Schwartz, Jr."
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
JULY 22, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
July 19, 3:13 p.m. 1996

R.E. PAYNE	CIVIL ACTION
VERSUS	NO. 95-2968
UNITED STATES DEPT. OF JUSTICE ET AL	SECTION "A"

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the government's motion for summary judgment on R.E. Payne's Freedom of Information Act claim. In his complaint, plaintiff alleged that the government failed to conduct an adequate search and improperly withheld tape recordings made during a criminal investigation of reputed mafia boss Carlos Marcello. Since plaintiff filed his complaint, an expanded search was conducted by the government during which 6 tapes responsive to plaintiff's FOIA request were discovered. In light of the discovery, the plaintiff no longer contends that there are any tapes responsive to his request which have yet to be uncovered. Rather, plaintiff alleges that the tapes are being withheld in bad faith to protect the interests of former United States Attorney John Volz. For the reasons stated below, there is simply no evidence to support such an allegation.

It is undisputed that the tapes at issue were obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521. The Act closely regulates the government's authority to disclose intercepted communications, indicating a Congressional intent that intercepted communications remain secret, except in limited circumstances. *See Lam Lek Chong v. DEA*, 929 F.2d 729, 734-45 (D.C. Cir. 1991). As such,

DATE OF ENTRY
JUL 19, 1996

Title III communications "fall squarely within the scope of Exemption 3" of the FOIA. *See Davis v. Dept. of Justice*, 968 F.2d 1276, 1280-81 (D.C. Cir. 1992). Under that exemption, the government is not required to turn over materials that are "specifically exempted from disclosure by another statute." Indeed, a prior effort to obtain the Marcello tapes under the FOIA was squarely rebuked by the Court of Appeals for the district of Columbia. *Id.* The court therefore finds that the government properly withheld the tape recording requested in plaintiff's FOIA request and that it is entitled to summary judgment. Accordingly,

IT IS ORDERED that the government's motion for summary judgment is hereby GRANTED.

The Clerk of Court is directed to enter judgment in accordance herewith.

New Orleans, Louisiana, this 18th day of July, 1996.

"S/Charles Schwartz, Jr."
United States District Judge

APPENDIX C

STATUTES AND RULES INVOLVED IN THE CASE

THE FREEDOM OF INFORMATION ACT
5 U.S.C. Section 552 b

§ 552b. Open meetings

(a) For purposes of this section –

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency.

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b)

shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to –

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense of foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any persons;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforce-

ment proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would —

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an

action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controver-

sy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgement or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for

the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

18 U.S.C. Section 2517

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while

engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

(As amended Pub.L. 91-452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947; Pub.L. 99-508, Title I, § 101(c)(1)(A), Oct. 21, 1986, 100 Stat. 1851.)

APPENDIX D

TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

Filed for Record
'96 June 26, 9:14 a.m.
"S/Lederle"
Deputy Clerk
Parish of Jefferson, LA.
Div. I Judge Jo Ellen Grant

STATE OF LOUISIANA

NO. 495-132 DIVISION DOCKET NO.

JOHN VOLZ

VERSUS

SENIOR POLITICAL ACTION NEWSLETTER, INCORPORATED AND R. E. "GUS" PAYNE

FILED: _____ _____

DEPUTY CLERK

TO THE HONORABLE, THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, AND THE JUDGES THEREOF:

PETITION

The Petition of John Volz, through undersigned counsel, respectfully represents:

I.

Petitioner, John Volz, is a person of the full age of majority, who is a resident and domiciliary of St. Tammany Parish, State of Louisiana.

II.

Defendant, Senior Political Action Newsletter, Incorporated, is a Louisiana corporation, with its principal place of business in Jefferson Parish, Louisiana, and was, at all times pertinent herein, authorized to do and doing business within the State of Louisiana and within the jurisdiction of this Honorable Court.

III.

Defendant, R. E. "Gus" Payne, is a person of the full age of majority and is a resident of and domiciliary of the Parish of Orleans, State of Louisiana.

IV.

On or about October 15, 1995, defendants produced and disseminated to the public a publication entitled *The Watchdog*. In the October 15, 1995 issue, defendants falsely stated that petitioner had accepted bribes from individuals seeking to influence cases that fell within the jurisdiction of the United States Attorney's Office in New Orleans.

V.

In the October 15, 1995 issue of *The Watchdog*, defendants also falsely asserted that petitioner had illegally accepted cash payments on repeated occasions while a public official. Defendants also falsely stated that petitioner, while a public official, conspired with organized crime in exchange for money. In

addition, defendants published certain information concerning petitioner's private life, all with the intent to inflict emotional distress upon him.

VI.

On or about November 15, 1995, in another issue of *The Watchdog*, defendants again falsely asserted that petitioner had solicited bribes or payments for assistance in handling cases under his control when he was an Assistant District Attorney in the Parish of Orleans and when he was the United States Attorney in New Orleans; defendants falsely stated that petitioner was appointed to the position of United States Attorney as a result of the influence of organized crime, and they falsely stated that petitioner, while United States Attorney for the Eastern District of Louisiana, was in business with members of organized crime.

VII.

In the November 15, 1995 issue of *The Watchdog*, defendants falsely stated that petitioner was appointed to the position of United States Attorney as a result of connections with organized crime.

VIII.

Within the last year, defendants have republished and reprinted *Above the Law* in which defendants repeatedly slander, libel, and defame petitioner, including knowingly making false and defamatory statements that accuse petitioner of unlawful and criminal conduct, all of which renders defendants at fault for slander, libel, defamation.

IX.

Defendants' publications concerning petitioner in *The*

Watchdog and in *Above the Law* are defamatory, slanderous, false, and malicious, and they have caused injury to petitioner.

X.

To the extent that defendants' defamatory, slanderous, and false publications were upon matters of public concern, they were made with actual, or implied, malice and with defendants' knowledge of their falsity and with defendants' knowing and reckless disregard for the truth.

XI.

Defendants' libelous publications concerning petitioner are defamatory *per se,* inasmuch as defendants falsely accuse petitioner of criminal, illegal or otherwise illicit conduct. Because defendants' statements are defamatory *per se,* their malice and falsity are legally presumed.

XII.

Defendants' false statements and publications were intended to inflict severe emotional distress upon petitioner. Defendants' conduct was extreme, outrageous, and has resulted in serious emotional distress to petitioner. Defendants not only desired to inflict severe emotional distress upon petitioner, they knew that severe emotional distress would be certain or substantially certain to occur. As a result of the aforementioned conduct, petitioner, John Volz, has suffered injury to his standing in the community, to his reputation, and he has been caused to experience severe emotional and mental distress and humiliation.

XIII.

Petitioner, John Volz, hereby prays for all damages as may be

reasonable under the premises as a consequence of defendants' tortious conduct, including damages for past and future mental anguish and suffering, for injury to his reputation, for embarrassment and humiliation, and for impairment of his earning capacity.

WHEREFORE, petitioner, John Volz, prays that the defendants, Senior Political Action Newsletter, Incorporated and R. E. "Gus" Payne, be served with copies of this petition and be duly cited to appear and to answer hereto and that, after legal delays and due proceedings had, there be judgment herein in favor of petitioner, John Volz, against defendants, Senior Political Action Newsletter, Incorporated, and R. E. "Gus" Payne, jointly severally, and *in solido*, for all damages reasonable under the premises, with interest thereon from date of judicial demand until paid, for all costs of these proceedings, and for all general and equitable relief.

Respectfully submitted,

GAINSBURGH, BENJAMIN, DAVID,
MEUNIER, NORIEA & WARSHAUER

By: "S/Stevan C. Dittman"
STEVAN C. DITTMAN, No. 16888
2800 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2800
Telephone: 504-522-2304

Attorneys for Petitioner

PLEASE SERVE:

SENIOR POLITICAL ACTION
NEWSLETTER, INCORPORATED
through its agent for service of process
R. E. "Gus" Payne
261, Jules, Suite 72
Jefferson, Louisiana 70121

R.E. "GUS" PAYNE
2455 Wisteria Street
New Orleans, Louisiana 70122

APPENDIX E

AFFIDAVIT

Declaration of R. E. Payne:

I, R.E. Payne, hereby declare there exist substantial differences in material facts as stated by the Department of Justice and FBI in its *Memorandum in Support of Motion for Summary Judgment.* These differences are:

1. The F.B.I. has insisted since 1994 when I first filed my FOIA request for the tapes recorded in Carlos Marcello's office on February 1-3, 1980 of Marcello, Vincent J. Bruno, Sam Cariola and John Condon, Jr. that these tapes **did not exist.** The FBI claimed repeatedly over a two year period that the tapes **did not exist.** As recently as November, 1995 the U.S. Attorney's office in New Orleans joined with the FBI and said the tapes **did not exist.** The presiding Magistrate at a hearing on the tapes said that she could not order the government to give us tapes that **"did not exist."**

The FBI continued its insistence that the tapes **did not exist** despite the fact that the plaintiff furnished the FBI with a statement from L. Eads Houge, former Chief of Organized Crime Strike Force in New Orleans in charge of BRILAB, that the tapes sought by plaintiff were placed by him in the safe of US District Judge Charles Schwartz's. Hogue said the tapes from the relevant period either had to be in Judge Schwartz's safe, or if they had been removed, that documentation had to have been left with Judge Schwartz by the F.B.I. stating the tapes were removed, and where they were taken.

The FBI did not perform a reasonable or adequate search for the tapes and may have acted to **conceal the tapes** from plaintiff, in as much, as the plaintiff repeatedly informed the FBI of the

possible location of the tapes to no avail until March 1996 when the tapes were finally located in New Orleans where the plaintiff **said they were** since 1994.

2. The Declaration of Bobbie S. Olivari refers to the BRILAB tapes on the trial "play list" only. Olivari knows as does the F.B.I., that the tapes sought were never on the BRILAB "play list", and plaintiff made this clear to the F.B.I. Olivari is an employee of the FBI-HQ in Washington, D.C. She confirms in her declaration that the tapes requested were "not maintained at FBI-HQ as part of the BRILAB records." Olivetti's admission that the tapes were never in FBI-HQ is very important as it confirms plaintiff's allegations that certain agents of tile FBI New Orleans, possibly in conspiracy, with the U.S. Attorney's Office under Mr. Volz during that period, kept the tapes in New Orleans in Judge Schwartz's safe to **conceal** the truth of their contents from FBI supervisors in New Orleans and, especially from FBI-HQ. All other BRILAB tapes were sent to FBI-HQ except the tapes sought by the plaintiff.

3. The Declaration of Elizabeth M. Nemeth states she conducted "an extensive search" for the tapes sought by plaintiff, but this wasn't done until March 1996 following media reports in the "Watchdog" newspaper about the FOIA case pending in U.S. District Court. She declared that she located "conversations of possible interest" to plaintiff. She did not declare where or how she "located" the tapes, but she did admit to **locating them in New Orleans** where the plaintiff told the FBI they were since 1994. It is obvious the FBI has not acted in good faith and has not conducted a diligent or even adequate search for the tapes, if it had, they would have been located in 1994, instead of 1996.

4. Although the FBI has now agreed it **located** six tapes of interest to plaintiff, the log of conversations provided reflect only conversations from Feb., 2-3, 1980, and none from Feb. 1, 1980, a date the FBI has acknowledged they have recorded "conversations of interest" to the plaintiff.

5. The FBI alleges it must protect the rights of privacy of third party individuals mentioned in the taped conversation of Marcello, Cariola, Bruno and/or Condon. The plaintiff has no desire to violate any person's privacy rights. The facts are that both Marcello and Cariola are deceased and their deaths have been acknowledged by the FBI; Bruno, a participant, has waived his rights to privacy. We are not interested in comments about Condon or any other person. We expressly stated our interest is in conversations about the United States Attorney John Volz who had **ties** to organized crime and was the subject of the conversations during the period Feb. 1-3, 1980 that confirm these ties. References to any other person may be deleted, Volz, as a possible **corrupt federal official,** is not entitled any privacy rights as it is in the public interest that this be exposed.

It is also in the public interest to expose the tapes that may have been deliberately **concealed** by certain parties within the FBI and U.S. Attorney's Office in New Orleans to protect John Volz from possible exposure, indictment and/or prosecution, to the extent as to conceal the content of the tapes from L. Eads Hogue, and even from FBI-HQ by **hiding** them in Judge Schwartz's safe instead of sending them to FBI-HQ where they should have been sent along with the other 1600 BRILAB tapes.

6. The Declaration of Warren B. Jung, II also states that the tapes of "interest to the plaintiff" for the period Feb., 1-3, 1980 were located in New Orleans. Although he refers to a list of the tape recording records, the list does not include conversations from Feb. 1, 1980.

Sworn and subscribed before me

this 6th day of July, 1996.

"S/J. Charles Collins, Jr."
NOTARY

APPENDIX F

AFFIDAVIT

Declaration of Vincent Bruno:

I, Vincent Bruno hereby declare the following:

1. That I receive information from Glen Armetor, former President of the Lafayette Bar Association, that during the period of time that he was opposing the nomination and confirmation of former U.S. Attorney John P. Volz for judge for the Middle District of Louisiana. Mr. Armetor was visited by an F.B.I. agent on behalf of then U.S. Attorney Volz told Mr. Armetor that he had "better win." The inference was clear; he had better win in his struggle to block Mr. Volz's installation to the federal bench. The visit and subsequent statement of the F.B.I. agent caused Mr. Armetor to be fearful.

2. That during the recent election contest for Sheriff of St. Tammany Parish in which former U.S. Attorney John Volz was a participant, several citizens of St. Tammany parish were at charity fund raising events. During the event, Mr. Blossman and Mr. Smith had an occasion to speak with Mr. Volz, who was an uninvited guest, and referred to him as an a--hole. The F.B.I. again showed their interest in Mr. Volz by conducting what I believe to be an unwarranted federal investigation at the request of Mr. Volz (see attached newspaper article).

3. That current members of the U.S. Attorney's office have an interest in Mr. Volz election to high public office. These Justice Department employees contributed to Mr. Volz's campaign fund, thus, had an interest in the election's outcome.

4. That I was present and a participant in the above described conversation(s) between Carlos Marcello and Sam Cariola in

which then United States Attorney John P. Volz's connection with members of organized crime was discussed. I have also been present at meetings between organized crime figure Sam Cariola and U.S. Attorney John Volz.

5. That I waive any and all privacy rights in this matter.

It is obvious that current members of the Department of Justice are using federal power to aid one of their own, former U.S. Attorney John Volz. Declarer has reason to believe that the F.B.I. also used its power to conceal then U.S. Attorney Volz's involvement with members of organized crime. In fact, the Department of Justice is to this day protecting Mr. Volz; one would only need to look at its recent denial of the existence of tapes recorded on February 1-3 of 1980 in Carlos Marcello's office. The information contained on the tapes in question is very damaging to Mr. Volz, and if made public, would reveal a cover-up by the F.B.I. regarding Mr. Volz's involvement with members of organized crime. The F.B.I. was untruthful by denying the existence of the above tapes. Now, that the tapes have been discovered, they are trying to make sure that they are not made public. To make them public, would expose the F.B.I.'s cover-up in this matter.

Sworn and subscribed before me

this 6th day of July, 1996.

"S/J. Charles Collins, Jr."
NOTARY

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

R.E. PAYNE,

PLAINTIFF

V.

UNITED STATES DEPARTMENT OF JUSTICE AND FEDERAL BUREAU OF INVESTIGATION,

Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552, as amended, to order the production of agency records, consisting of the following: (1) Any and all tape recorded conversations of their transcriptions taped in connection with BRILAB and/or any other investigations of Carlos Marcello taped in the office of Marcello at 1201 Airline Highway, Metairie, Louisiana, on February 1, 2, and 3, 1980, among participants Carlos Marcello, Vincent J. Bruno, of New Orleans, Louisiana, and Sam Cariola, of Buffalo, New York, and/or John W. Condon, Jr., and any and all recaps of these meetings in possession of the defendants; (2) Any FBI reports of these dates, February 1, 2 and 3, 1980, summarizing of characterizing these conversations; (3) Any and all tape recorded conversations of these dates (or written transcriptions) involving discussions of John Volz, United States attorney at the time, or any FBI reports involving Volz in connection with conversations taped by the FBI on the referenced dates and address.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. Section 552 (a)(4)(B).

3. Plaintiff, R. E. Payne, presently engaged with the "Watchdog" Newspaper, is a journalist and author, who worked with the FBI at the request of the FBI and who was wrongfully prosecuted by the Department of Justice while John Volz was the United States Attorney for the Eastern District of Louisiana. Plaintiff was acquitted by the jury at the trial. He wrote the details of his ordeal in his book "Caught in the Crossfire: The R. E. Gus Payne Story". He authored a book entitled "Above the Law: The Unauthorized Biography of John Volz", and his investigation led him to much information about the unethical practices of John Volz. Plaintiff, has reason to believe that the records he seeks herein will disclose discussions by Carlos Marcello, Sam Cariola, John W.Condon, Jr., and Vincent Bruno of John Volz's acceptance of bribes from persons seeking to influence handling of cases and/or investigations and/or sentences.Misconduct on the part of the FBI may be found if it had this information and failed to expose a corrupt United States attorney. The FBI has continued to assist John Volz with his political endeavors after he ceased being the United States attorney. John Volz is running for sheriff of St. Tammany Parish. Power of that office in the hands of a corrupt and unethical person would be most detrimental. It is clearly evident that the public interest in disclosure of the information sought by Plaintiff far outweighs any claim of privacy of the participants to the conversations. Carlos Marcello and Sam Cariola are now deceased. John W. Condon, Jr., was on one tape only. Vincent Bruno is desirous of having the tapes and documents produced. Rather then claim a privacy exemption to protect these "Mafia" connected individuals, the conversations and their close relationship with a corrupt United States attorney should have been exposed.

4. Defendants, the United States Department of Justice and the Federal Bureau of Investigation, are agencies of the United States

and they have possession and control over the records that Plaintiff seeks.

5. By request of February 2, 1994, made to the New Orleans office of the Federal Bureau of Investigation (FBI), Plaintiff requested all records enumerated above in Paragraph I. Plaintiff was notified by letter dated April 19, 1994, from J. Kevin O'Brien, Chief, Freedom of Information-Privacy Acts Section, Information Resources Division of the FBI in Washington, D.C., that the request had been referred to his office from the New Orleans office.

6. Plaintiff was notified by J. Kevin O'Brien in a letter dated June 2, 1994, that a review of files and of taped conversations maintained at FBI headquarters failed to reveal the information Plaintiff was seeking. Only a "Play List" of tapes utilized in the trial of Carlos Marcello was provided. By letter dated June 12, 1994, Plaintiff appealed the decision of june 2, 1994, and pointed out that the reason for denial was erroneous as the search was limited to the play list of tapes at the BRILAB trials and failed to include a review of the period requested that was not a part of the BRILAB trials but were recorded as a part of the investigation. Plaintiff has learned that the tapes requested do exist and were sealed by Judge Charles Schwartz and L. Eads Hogue, former Chief of the Organized Crime Task Force. By letter dated August 11, 1995, from Richard Huff, Co-Director of the United States Department of Justice, Office of Information and Privacy, Plaintiff was advised that the original notice stating no records within the scope of the request could be located in its files was correct. He did not mention any search of Judge Schwartz safe. He further alleged that it could be located, it would be denied under the exemption provided in 5 U.S.C. Section 552 (b)(7)(C), and he stated that "lacking an individual's consent, proof of death, or an overriding public interest, disclosure of law enforcement records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal priva-

cy". He enclosed a copy of the case, *Davis v. Department of Justice,* 968 F.2d 1276 (D.C. Cir. 1992) to support his position.

7. Plaintiff has a statutory right to the records that he seeks, and there is no legal basis for defendants' refusal to disclose them to him.

WHEREFORE, for the reasons stated herein, Plaintiff prays that this Court will:

(1) Declare that defendants' refusal to disclose the tapes and records requested by plaintiff is unlawful;

(2) Order defendants to make the requested records available to plaintiff;

(3) Award plaintiff his costs and reasonable attorney's fees in this action;

(4) Waive the costs of searching for and copying tapes and records;

(5) Grant such other and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

"S/Michael E. Soileau"
MICHAEL E. SOILEAU
La. Bar No. 12248
21014 South Taylor Rd.
Covington, La. 70435
Telephone: 504-893-1948
Attorney for Plaintiff

"S/J. Charles Collins, Jr."
J. CHARLES COLLINS, JR.
La. Bar No. 4293
940 Harding Dr.
New Orleans, La. 70119
Telephone: 504-488-9718
Of Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the above Complaint and the INterrogatories by placing same in the United States mail, certified, to Hon. Janet Reno, Attorney General of the United States, United States Department of Justice, Washington, D.C., all postage fees have been paid, and I hereby certify that I have served a copy of the Complaint and Interrogatories on the United States Attorney for the Eastern District of Louisiana, by hand delivery at the United States Attorney's Office, 501 Magazine Street, New Orleans, Louisiana.

"S/Michael E. Soileau"
MICHAEL E. SOILEAU

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

R.E. PAYNE — CIVIL ACTION NO.

Plaintiff

V

UNITED STATES DEPARTMENT OF JUSTICE AND
FEDERAL BUREAU OF INVESTIGATION

Defendants

MOTION FOR VAUGHN INDEX

Plaintiff hereby moves the Court to order the defendants, United States Department of Justice and Federal Bureau of Investigation, to provide to his attorney, within 20 days of the date of the court's order, with an index of the withheld documents and tapes and portions thereof at issue in this case, pursuant to *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977(1974). A supporting memorandum and a proposed order are attached.

RESPECTFULLY SUBMITTED,

"S/Michael E. Soileau"
MICHAEL E. SOILEAU
La. Bar No. 12248
21014 South Taylor Rd.
Covington, La. 70435
Telephone: 504-893-1948
Attorney for Plaintiff

"S/J. Charles Collins, Jr."
J. CHARLES COLLINS, JR.
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940 Harding Dr.
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Telephone: 504-488-9718
Of Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

R.E. PAYNE — CIVIL ACTION NO.

Plaintiff

V

UNITED STATES DEPARTMENT OF JUSTICE AND
FEDERAL BUREAU OF INVESTIGATION

Defendants

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR VAUGHN INDEX

In this action under the Freedom of Information Act, 5 U.S.C. Section 552, as amended, (FOIA), plaintiff seeks access to documents and tapes in the possession of the Federal Bureau of Investigation ("FBI") concerning discussions by Carlos Marcello, Sam Cariola, John W. Condon, Jr., and Vincent Bruno of John Volz's acceptance of bribes from persons seeking to influence handling of cases and/or investigations and/or sentences. Plaintiff has learned that the tapes requested do exist and were sealed by Judge Charles Schwartz and L. Eads Hogue, former Chief of the Organized Crime Task Force. The tapes were part of the BRILAB investigation. The precise documents and tapes to which plaintiff seeks access are itemized in the plaintiff's FOIA request dated February 2, 1994, directed to the FBI office in the City of New Orleans, Louisiana, and also enumerated in Paragraph I of Plaintiff's Complaint for Declaratory and Injunctive Relief filed herein.

It is now well-established law in this Circuit that a plaintiff in an FOIA case is entitled to an index of the documents and por-

tions of documents that have been withheld by the defendant agency. *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). That index must describe each document orportion of each document that has been withheld and give a detailed justification of the agency's grounds for nondisclosure, correlating each exemption of the FOIA upon which the agency relies with the record or portion of the record to which the exemption purportedly applies. *Vaughn,* supra. Moreover, the description of the withheld material must be "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under the FOIA". *Founding Church of Scientology v. Bell,* 603 F.2d 945, 949 (D.C. Cir. 1979).

In this case, there are documents and tapes that have been withheld from the plaintiff in whole. Therefore, a *Vaughn* index would be particularly useful in sharpening the issues and in permitting the plaintiff to test the bases for the government's exemption claims. Therefore, plaintiff has requested the Court to require the FBI to provide his attorneys with an appropriate *Vaughn* index within 20 days of the date of the Court's order.

RESPECTFULLY SUBMITTED,

"S/Michael E. Soileau"
MICHAEL E. SOILEAU
La. Bar No. 12248
21014 South Taylor Rd.
Covington, La. 70435
Telephone: 504-893-1948
Attorney for Plaintiff

"S/J. Charles Collins, Jr."
J. CHARLES COLLINS, JR.
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New Orleans, La. 70119
Telephone: 504-488-9718
Of Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the above Motion for Vaughn Index, Memorandum in Support of Plaintiff's Motion for Vaughn Index and proposed Order by placing same in the United States mail, certified, to Hon. Janet Reno, Attorney General of the United States, United States Department of Justice, Washington, D.C., all postage fees have been paid, and I hereby certify that I have served a copy on the United States Attorney for the Eastern District of Louisiana by hand delivery to the United States Attorney's Office, 501 Magazine Street, New Orleans, La., on the 8th day of September, 1995.

"S/Michael E. Soileau"
MICHAEL E. SOILEAU

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

R.E. PAYNE — CIVIL ACTION NO.

Plaintiff

V

UNITED STATES DEPARTMENT OF JUSTICE AND
FEDERAL BUREAU OF INVESTIGATION

Defendants

ORDER

Upon consideration of Plaintiff's motion for a Vaughn index, and the defendants' response thereto, it is this day of , 1995,

ORDERED, that plaintiffs motion is granted, and it is further

ORDERED, that, within 20 days, defendant will provide plaintiff's attorneys with an index of the documents and portions of documents that have been withheld, describing each such document or portion of a document, and detailing the agency's claims for withholding such document or portion of a document, correlating each asserted exemption of the Freedom of Information Act with the material for which the agency claims the exemption applies.

_____
UNITED STATES DISTRICT JUDGE